No. 80-581

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

—against—

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF THE STATES OF WYOMING, COLORADO, NEVADA, IDAHO, WASHINGTON, AND OREGON AS AMICI CURIAE

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BRIEF OF THE STATES OF WYOMING, COLORADO, NEVADA, IDAHO, WASHINGTON, AND OREGON AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the State of Wyoming and is sponsored by the Attorney General of the State of Wyoming as authorized by Supreme Court Rule 36.4. This Brief is also filed on behalf of the States of Colorado, Nevada, Idaho, Washington and Oregon.

Within many of the Amici states lie substantial quantities of coal and other natural resources. These states have exercised their traditional power to tax the severance of these natural resources for many years. Although the rate and incidence of the severance taxes imposed by these states are not uniform, all of them share a common interest in this action. The taxing and governmental structure of each would be adversely affected by a decision of this Court which accepted,

in whole or in part, the arguments of Appellants.

The Amici States support the Brief submitted by Appellees and would urge the Court to affirm the decision of the Supreme Court of the State of Montana for the reasons set forth therein. As more fully set forth herein, the Amici States assert that: (1) the ability of a state to generate revenue to provide for general governmental services must override vague considerations of a burden on interstate commerce, and (2) an implied federal "policy" which is self-contradictory cannot preempt the taxing power of a state, particularly where federal laws reserve that taxing authority to the state.

BACKGROUND

As of 1976, the demonstrated coal reserve in the United States was 438 billion tons. Approximately 235 billion tons were in the western United States and 203 billion tons were in the eastern United States. This reserve base supported coal production of 679 million tons in 1976. [1] Demonstrated coal reserve base and coal production for the six western states of Colorado, Montana, New Mexico, North Dakota, Utah and Wyoming are set forth below and compared with the national total: [2]

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1. Bureau of Land Management of the Department of Interior, *Final Environmental Statement, Federal Coal Management Program*, Table 2-1, at 2-3 (April, 1979) (hereinafter "Federal Coal Management Program").

2. *Id.*, at Tables 2-2 and 2-8.

	Demonstrated Reserve Base 1976 (billion tons)	Coal Production (million tons) 1962	1972	1976
Colorado	16	3.4	5.6	9.4
Montana	120	0.4	8.2	26.2
New Mexico	4	0.7	8.2	9.8
North Dakota	10	2.7	6.6	11.1
Utah	6	4.3	4.8	8.0
Wyoming	55	2.6	10.9	30.9
National Total	438	421.3	590.7	678.7

Clearly, the nation's coal reserve base and production are broadly distributed. However, growth in western coal production from 1962 to 1976 has been extremely rapid. This rapid growth can be further illustrated by examining both Wyoming production and applicable severance tax rates:

State of Wyoming

Year	Tons Produced (million)[3]	Severance Tax Rate
1962	2.6	0
1970	7.0	1%
1972	10.9	1%
1976	30.9	5.2%
1979	68.8	10.5%
1985 (est.)	150.0	—

The State of Wyoming presently levies a 10.5% severance tax on coal, W.S. §§39-6-302 and 39-6-303 (1977), not the 17% previously suggested by Appellants.[4] In addition, coal is subject to a local property (ad valorem) tax of ap-

3. *1980 Wyoming Mineral Yearbook*, at 15-16 (Mineral Division, Wyoming Department of Economic Planning and Development, January 1981).

4. Brief of Appellants at 9 n.2.

proximately 6.5%.[5] The 10.5% and 6.5% rates are both applied to the market value of the coal on production, excluding certain expenses such as hauling costs, tippling allowance, federal royalties, federal black lung fee and federal reclamation fee.

The proceeds of the state severance tax are distributed in accordance with a statutory formula to meet both present and future needs. For fiscal year 1980, approximately 42 million dollars was collected and distributed[6] as follows: general fund, $8 million; permanent mineral trust fund, $10 million; capital facilities account,[7] $6 million; coal impact ac-

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5. Under Wyoming Constitution Article 15, Section 3, land used in mineral production is exempt from taxation upon the value of the land. Instead, it is taxed on the gross value of the minerals produced. The applicable percentage figure varies from county to county as the property tax rates vary.

6. Distribution is governed generally by W.S. §39-6-305 (1977). Total Wyoming state revenues from all sources for fiscal year 1980 was $971 million. *Annual Report of the State Treasurer [for the period ending June 30, 1980]* 6 (Wyoming State Treasurer, October 1, 1980).

7. The capital facilities revenues are distributed by the Capitol Building Commission under W.S. §39-6-306 (1980 cum. supp.): thirty percent finances school district capital construction entitlements; ten percent finances community college construction; and sixty percent is distributed to the highway fund for constructing, repairing and acquiring highways and related facilities.

count;[8] $8 million; water development account,[9] $6 million; and highway fund, $4 million.

The State of Montana also distributes coal severance tax proceeds with a concern for both the present and future needs of the state and its residents. The percentages have varied over time but allocations have been made to: the permanent trust fund; the county of origin; the state general fund; the local impact and education trust fund; alternative energy research and development; the county land planning account; the renewable resource development account; the parks acquisition and legacy fund; the coal area highway improvement account; and the public school equalization aid fund. Mont. Code Ann. §15-35-108 (1979).

The growth in regional and state coal production rebuts the assertion that state and local governmental fiscal policies have burdened coal production and use.[10] Further-

8. The Wyoming Farm Loan Board disburses this money to local political subdivisions and the state highway department to finance public water, sewer, highway, road or street projects in areas impacted by coal production. W.S. §39-6-305 (e) (1980 cum. supp.).

9. The legislature authorizes water development projects, financed from this fund. W.S. § 39-6-305 (g) (1980 cum. supp.).

10. The Presidents's Commission on Coal explicitly identified increasing rail tariffs for coal as possibly moderating the current boom in western coal production. President's Commission on Coal, *Coal Data Book*, at 198 (Feb. 1980). The Commission identified "[t]he undue burden placed on coal haulage by the ICC [a]s slowing the rate of voluntary coal conversion and raising the delivered price of domestic coal to the point where imported coal. . . is the cheaper to some users." President's Commission on Coal, *Recommendations and Summary Findings*, at 7 (March 1980). The Commission reports do not raise any similar concerns with regard to state severance taxes.

more, federal and state statutes establish a common policy that mining should occur on terms which preserve environmental quality and protect human health and safety. [11] State fiscal policies, tailored to the needs of each state and designed to insure that the ultimate costs of rapid coal development are internalized to the coal,[12] complement this common policy.

SUMMARY OF ARGUMENT

I

Expansion of the scope of the Commerce Clause, coupled with elimination of the absolute immunity from state taxation that interstate commerce once enjoyed, has invited Commerce Clause scrutiny of state taxes under the four-pronged test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (hereinafter "*Complete Auto Transit*"), on activities which were previously characterized as purely local. Where the taxed activity has a substantial nexus with the taxing state, the tax is fairly apportioned and the tax does not discriminate against interstate commerce, judicial scrutiny of tax benefits should be severely limited in deference to state interests and in the interest of judicial

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11. *E.g.*, The National Environmental Policy Act of 1969, P.L. 91-190, 83 Stat. 852, 42 U.S.C. §§ 4321-4347 (1976); Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, 91 Stat. 447, 30 U.S.C. §§ 1201-1328 (Supp. III 1979); Occupational Safety and Health Act of 1970, P.L. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 661-678 (1976 and Supp. III 1979) (as amended); Wyoming Environmental Quality Act, W.S. §§35-11-101 to 1104 (1977); Industrial Development Information and Siting Act, W.S. §§35-12-101 to 121 (1977).

12. *See generally*, House, *The Quest for Completeness* (1976); Andrews and Waits, *Environmental Values in Public Decisions* (1978).

economy. Long-term pass-through contracts should not become vehicles to clog the federal judiciary with numerous challenges to state tax structures. Unless the federal judiciary is willing and able to calculate user fees in lieu of state taxes of general application, great deference must be given to tax rates as determined by state legislative processes. Finally, the balance of governmental interests is best served by leaving the determination of tax benefits to congressional and state legislative resolution.

II

The Appellants cannot succeed under their Supremacy Clause analysis. The volume of federal energy legislation encouraging coal production is distinct from, and consistent with, the application of a state severance tax. Federal energy legislation is as consistent with a state severance tax as it is with any state tax which increases coal energy costs, whether at the mine site or in the consuming state. In addition, a "sliding scale" of preemption analysis is unsupported by past Supreme Court precedent and cannot be equitably applied within the federal system.

III

Appellents' Supremacy Clause argument under the Mineral Lands Leasing Act of 1920, Ch. 85, 41 Stat. 437, is supported by neither statutory language nor legislative history. Not only are the relevant statutes clear and unambiguous regarding the states' concurrent taxation jurisdiction, but nothing in the legislative history clouds these provisions.

ARGUMENT

I

JUDICIAL EXAMINATION OF STATE TAXES UNDER ONLY A TAX BENEFIT CHALLENGE SHOULD BE EXTREMELY LIMITED

The historical development of Commerce Clause theory in state taxation focuses the issue before the Court. From the early part of the century until 1977, any recognition that the "operating incidence", *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940), of a state tax affected interstate commerce placed its validity in jeopardy. *Spector Motor Serv., Inc.* v. *O'Connor*, 340 U.S. 602 (1951), *rev'd, Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977); *Freeman* v. *Hewitt*, 329 U.S. 249 (1946). Commerce Clause challenges to state taxes were generally upheld absent a demonstration that the taxed activity was local in nature. *E.g., Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923). But the expansion of the scope of the Commerce Clause, *e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942), and the judicial recognition that interstate commerce may be required to "pay its way", *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), compelled this Court to expressly eliminate the absolute immunity from state taxation that interstate commerce once enjoyed. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-289 (1977).

Complete Auto Transit reversed a series of cases which applied a *per se* rule of unconstitutionality to state taxes imposed on interstate commerce. In that case, the Court abandoned its formalistic approach of invalidating state taxes relating to interstate commerce and set out a new four-pronged test. In order to survive Commerce Clause scrutiny,

the activity taxed must: (1) have a sufficient nexus with the state; (2) be fairly apportioned to local activities; (3) not discriminate against interstate commerce; and (4) be fairly related to services and benefits provided by the state to the taxpayer. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977).

The case presently before the Court is *not* the *Complete Auto Transit* case. The instant case involves issues substantially different from those present in *Complete Auto Transit.* The Appellants do not challenge the nexus or fair apportionment of severance taxes. More importantly, the potential for the multiple levy of similar taxes, present in *Complete Auto Transit* and its predecessors, is absent here. Coal plainly can be mined only once, and in one place. It follows that Appellants' challenge to the rate of Montana's tax is a departure from the precedent, and for this reason alone, should be denied. Simply stated, the Appellants seek judicial reduction of the state-imposed *rate* of tax on the basis that the *rate* of tax on a local activity discriminates[13] against

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13. The question of discrimination, however phrased, is not an issue under the facts at bar. Neither Wyoming nor Montana apply a severance tax formula which depends in any way upon the ultimate destination of the coal or any residency attributes of the producer. All energy consumers, both in-state and out-of-state, bear the same severance tax cost. The discrimination question was at issue in *Arizona Public Service Co.* v. *Snead,* 441 U.S. 141 (1979). Construing the Congressional definition of "discriminatory" contained in the Tax Reform Act of 1976, the Court held that, "Congress required only that New Mexico, if it chooses to tax the generation of electricity for consumption in either city, [whether in or out-of-state], tax it equally for each." *Id.,* at 151. The tax structures for both Montana and Wyoming tax the severance of coal, like the generation of electricity, equally for any destination.

interstate commerce and is not fairly related to services and benefits provided by the state to the taxpayer.

A. JUDICIAL SCRUTINY OF THE RELATIONSHIP BETWEEN TAX BENEFITS AND BURDENS SHOULD BE SEVERELY RESTRICTED IN-DEFERENCE TO THE STATE'S INTEREST IN DEVELOPING RESPONSIBLE FISCAL AND REGULATORY MEANS TO ADDRESS PRESENT AND FUTURE GOVERNMENTAL COSTS IMPOSED BY RAPID COAL DEVELOPMENT

The tax which comes under constitutional attack today is more than a compensatory tax, and is supported by more than a state's fiscal interest. The coal severance tax has an implicit regulatory effect with respect to the timing, setting and terms for nonrenewable resource development, which recognizes present and future needs. A thorough analysis of the impacts of coal development in rural states demonstrates that a coal severance tax is not "a bill presented to interstate commerce for services rendered by the taxing state." Tribe, *American Constitutional Law* 346 (1978). The state interests transcend the generation of revenues, and past decisions of this Court on revenue-raising taxes imposed on interstate commerce are not conclusive.*E.g., Complete Auto Transit, Inc.* v.*Brady, supra; Washington Revenue Dept.* v. *Stevedoring Ass'n.,* 435 U.S. 734 (1978); *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). Therefore, this Court must fashion a test which fully considers the burdens imposed by extraction industries on states and their citizens.

The Wyoming coal severance tax internalizes both the present and future costs of rapid coal development by accounting for social, economic, environmental and regulatory costs. In addition, the tax reserves a portion of the asset value through a trust fund, the earnings of which will be available as revenues for government operating costs once the coal

resource is depleted.[14] Meeting present and future needs is of utmost concern to a state in its sovereign capacity. Implicit in the decisions of this Court is the conclusion that the federal government cannot undermine the ability of states and their subdivisions to provide governmental services. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Absent a clear and compelling national interest, an attack on a state's fiscal decisions to provide traditional, essential governmental services cannot be sustained. Under the Commerce Clause, the state's interest in providing governmental services is paramount to Appellants' interest in maintaining their particular markets at an economic optimum. *Cf.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (the Commerce Clause protects the interstate market, not particular interstate firms).

Appellants' claim that a trial is necessary to determine whether the tax is fairly related to benefits and services provided by the state ignores the statutory distribution established for the Montana severance tax. On the face of the Montana statute, provision is made for state operating funds, county operating funds, a permanent trust fund to generate future government revenues, alternative energy research, county planning, local impact and education, renewable

14. Wyoming has already experienced a boom-bust cycle through the uranium industry. Uranium prices peaked at $43.00 per pound in 1978, and remained relatively constant for several years at $40.00. A precipitous price drop began in early 1980. The price today is $28.00 per pound. The price drop has resulted in a number of mines and research operations closing down, with no apparent reclamation goals. Many others have cut production. Report from the Wyoming Department of Environmental Quality to Governor Ed Herschler (January, 1981). Wyoming can expect the market for its coal to be similarly affected by any number of externalities, including rising transportation costs or lowering federal air quality standards.

resource development, park acquisition, the arts, coal area highway improvements and equalization of public school funds. Mont. Code Ann. §15-35-108 (1979). While Appellants assert that a "fair relationship" need not be determined with dollar-for-dollar precision, they refuse to acknowledge that the above uses of the tax establish the fair relationship by providing the coal producing Appellants with ". . . services that include not only police and fire protection, but the benefits of a trained work force and the advantages of a civilized society." *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 436 (1979). The decisive point is that this tax provides services and benefits which are neither slight nor problematical and, therefore, is not subordinate to the national interest in a free flow of interstate commerce. *Cf., Washington Rev. Dept.* v. *Stevedoring Ass'n.,* 435 U.S. 734, 747 (1978). This test is the fiscal side of the balancing test for state safety measures enunciated in *Southern Pacific Co.* v. *Arizona ex. rel. Sullivan,* 325 U.S. 761, 775-776 (1945).

This case involves governmental functions and services as discussed in the *Usery* case. The Appellants' restrictive view of governmental functions and services does not reduce the impact of rapid coal development in a sparsely populated area. Typically, the existing ranching or farming community lacks the infrastructure or resources to accommodate rapid industrial growth. Some towns will be created overnight. Millions of dollars must be expended for necessary capital facilities, including: sewage treatment, water treatment and distribution, solid waste, mental and physical health care, recreation and library, transportation, and educational facilities. In addition, the traditional police, fire and sanitation services must be provided.

The costs most difficult to calculate, however, are those associated with social problems accompanying rapid coal development. Boom-town conditions generate a dis-

proportionately high number of mental health problems, including alcoholism and child and spouse abuse, which require treatment and create a high demand for mental health services.[15] These conditions must be met by state and local funding for human service agencies and programs.

The high social, economic and environmental costs which accompany coal development are visible to any casual observer of the mines, the power plants, the trains, the saloons and the trailer camps of the area. These costs must be absorbed by state and local treasuries, funding new and revised facilities, programs and services. "Indeed, it is functions such as these which the states have traditionally afforded their citizens." *National League of Cities* v. *Usery*, 426 U.S. 833,851 (1976). The Appellants cannot now be allowed to disrupt and undermine the states' fiscal structure for the performance of these traditional, essential governmental functions and services. No less than a firm demonstration that the tax clearly exceeds the state and local governments' interests should be accepted when individual rights to basic services are put in jeopardy. Tribe, *American Constitutional Law* 314 (1978).

One additional state interest which must be considered is the state's duty to account for future governmental costs and services which occur when the physical wealth of a state is depleted. Quite recently this Court recognized resource conservation as a legitimate state purpose. *Minnesota* v. *Clover Leaf Creamery Co.*,____U.S.____, 49 U.S.L.W. 4111, 4113 (1981). The Minnesota case emphasizes an earlier Court pronouncement that "a state is justifiably concerned with preventing rapid and uneconomic disruption of one of its chief natural resources." *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 187 (1950).

The producers of coal in any particular region are not

15. For an account of the social and human costs of resource development, *see The Boom Town: Problems and Promises in the Energy Vortex* (Davenport and Davenport eds. 1980).

the sole beneficiaries against which to measure the benefit or burden of the taxes imposed thereon. Their employees and families and the employees and families of coal-induced support industries are equally germane to the calculation. State fiscal policies which provide protection against the year-to-year vagaries and impacts of coal production and which also look to the future welfare of the general population associated with that production vindicates "... the most fundamental principle of government—that it exists primarily to provide for the public good." *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 522-523 (1937). Providing for the public good requires decisions now in order to meet future expectations of basic governmental services. The Appellants here should not be allowed to emasculate a state's ability to meet these responsibilities. To accept Appellants' assertion would result in "displacing state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *National League of Cities* v. *Usery*, 426 U.S. 833, 847 (1976).

B. FACTUAL INQUIRY INTO WHETHER THE TAX IS FAIRLY RELATED TO BENEFITS AND SERVICES PROVIDED BY THE STATE, ABSENT OTHER CIRCUMSTANCES, INVITES A FLOOD OF COMMERCE CLAUSE CHALLENGES

The utility Appellants purchase Montana coal ". . .pursuant to long-term coal purchase contracts which provide that the costs of taxation will be passed along to the consuming utilities" (hereinafter referred to as "pass-through contracts"). Brief of Appellants at 8. All Appellants have conceded ". . . that the severance of natural resources within a state is an appropriate subject of that state's taxation." Brief of Appellants at 6.

Long-term pass-through contracts are frequently used in business. If the Court grants the factual inquiry into tax benefits sought by the Appellants, any entity in circumstances similar to the instant case could raise a Com-

merce Clause challenge. Such challenges would not necessarily be limited to natural resource taxation cases. This result would be inimical to the taxing structure of each and every state in the Union, as well as injecting the judiciary into lengthy and imprecise determinations of legislative facts.

Appellants concede that "[t]here is no point in the continuous process of taking coal from a mine and delivering it for use at which it is necessary or appropriate to prohibit state taxation absolutely, even assuming that the process has become interstate commerce." Brief of Appellants at 24. While Appellants concede that state coal severance taxes are valid, they ask the Court to undertake a factual inquiry into tax benefits to provide guidance to state legislatures on setting those rates. What rate of severance tax could be established by a state legislature. What costs could be constitutionally included in determining the tax rate: the cost of providing public roads and bridges to coal trucks, the cost of providing governmental services to only the employees of coal producers, the cost of providing governmental services to the spouses and children of employees of coal producers, the cost of providing governmental services to the employees and families of coal service industries, or the risk cost of higher unemployment and welfare in the event of a precipitous downturn in coal production and employment.

If the state legislature has no latitude in which its sound discretion will be accepted as valid and each tax must be justified by a cost accounting, any state tax affecting interstate commerce would be relegated to a users fee. Such a decision would repudiate long-standing principles of taxation:

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is

> constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. . . . Any other views would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of the government—that it exists primarily to provide for the public good.

Carmichael v. *Southern Coal Co.*, 301 U.S. 495, 522-523 (1937). The rate of a tax is a determination for the state legislature to make, not a court.

II

THE APPELLANTS HAVE FAILED TO IDENTIFY ANY PURPOSES AND OBJECTIVES OF CONGRESS THAT CAN SERVE AS A BASIS FOR PREEMPTION OF THE MONTANA STATE SEVERANCE TAX UNDER THE SUPREMACY CLAUSE

In Count II of their Complaint, Appellants asserted that a national policy favoring the production and use of coal, particularly low-sulphur western coal, is "substantially frustrated" by the Montana Coal Severance Tax, and hence unconstitutional under the Supremacy Clause. They now claim that the Montana Supreme Court erroneously failed to recognize this alleged national policy and erroneously failed to apply a "substantial frustration" test as proposed by Appellants. Appellants are incorrect in both respects.

It is well settled that "congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict."

Jones v. *Rath Packing Co.*,430 U.S. 519, 525 (1977). In concluding that a state law should give way, the Court must determine whether, under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 526. The question here is whether the many congressional acts passed in response to the Arab Oil Embargo of 1973 preempt state severance taxes on coal. This inquiry must be undertaken with full recognition of the concurrent taxing powers of the state and national governments. *Hines* v. *Davidowitz*, 312 U.S. 52, 67, n. 21 (1941). Recognizing this concurrent taxing power, the Court has struck down state taxes under the Supremacy Clause only in circumstances of patent conflict with federal interests. *E.g.*, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940).

Appellants' Supremacy Clause challenge is, of their own admission, limited. The only matter presented is whether the tax stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Brief of Appellants at 42. Significantly, there is no claim that conflicts between federal and state law render compliance with each impossible. *See, Florida Lime and Avocado Growers* v. *Paul*, 373 U.S. 132, *reh. den.* 374 U.S. 858(1963). Nor is the tax said to constitute, in substance and effect, the direct exertion of a forbidden power, as for example, the confiscation of property. *See, A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934); *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

A. AS A MATTER OF LAW, CONGRESS HAS NOT PREEMPTED STATE COAL SEVERANCE TAXES

The Montana Supreme Court correctly decided that, for the purposes of a motion to dismiss, the Montana District Court was not required to accept Appellants' allegations of law and legal conclusions as true. *See, Commonwealth Edison Co. v. State*, 615 P. 2d 847, 849 (Mont. 1980) Both Montana courts afforded Appellants ample opportunity to establish the purposes and objectives of Congress, a matter of law, by the presentation of various documentary sources. Supreme Court of Montana, No. 14982, Appendix to Brief of Appellants at 165 *et seq*. These sources are said to reveal a national policy for the encouragement of coal production. Brief of Appellants at 35 *et seq*. The State of Montana has addressed the fallacy of treating a vague national policy—rather than any clearly demonstrated purposes and objectives of Congress—as the basis for preempting state severance taxes. However, there are additional reasons for denying the Appellants an opportunity for trial.

While the volume of federal legislation related to energy matters certainly testifies to the complexity of the subject, most of the individual elements of the legislation are irrelevant to coal severance taxes. This is apparent from a cursory review of the five acts commonly known as the National Energy Policy, which include such diverse items as small hydroelectric power projects, Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§401 *et seq*.; gasohol, Energy Tax Act of 1978, Pub. L. No. 95-618, §221, 92 Stat. 3185; federal photovoltaic utilization, Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, §§561 *et seq*.; prohibition on use of natural gas for decorative outdoor lighting, Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, §402; and natural gas curtailment policies, Natural Gas Policy Act of 1978, Pub. L. No. 95-621, §§401 *et seq*. Appellants, having failed to articulate the alleged

conflict, cannot impose the burden of discovering a conflict on the courts.

Appellants' reliance on specific legislation is similarly strained. For example, the Montana severance tax has neither impeded federal reorganization under the Energy Reorganization Act of 1974, Pub. L. No. 93-438, nor impaired federal research efforts under the Energy Research and Development Administration Act (Authorizations and Appropriations for 1977), Pub. L. No. 95-39.

The Appellants' claim presupposes that the whole of federal energy policy is greater than the sum of its parts. This approach has never been adopted by the Court in its decisions. *E.g., Ray* v. *Atlantic Richfield Co.*,435 U.S. 151 (1978); *Jones* v. *Rath Packing Co.*,430 U.S. 519 (1977); *Perez* v. *Campbell*, 402 U.S. 637 (1971);*Hines* v. *Davidowitz*, 312 U.S. 52 (1941). In this case, there is no direct interference with federal law, as in *Perez* v. *Campbell*. There is no clear statement of federal purpose with which the tax inexorably conflicts, as in *Jones* v. *Rath Packing Co.* There is no comprehensive scheme of state regulation which parallels that of the federal government, as in *Ray* v. *Atlantic Richfield Co.* Nor have Appellants adduced any ambiguity of state regulatory structure which warrants further analysis, as in *DeCanas* v. *Bica*, 424 U.S. 351 (1976). The federal government has chosen to encourage coal production and utilization in certain limited ways. Montana has done nothing to interfere with the federal government's chosen methods.

Moreover, the consequences of allowing national policies, inferred from a complex fabric of broadly related legislation, to supplant state law are disastrous. In adjudicating natural resource issues, the judiciary would be requested to create resource colonies within the nation,

decisions better left to Congress.[16] Under the Appellants' theory, any congressional action may give rise to preemption in ways unforeseen and unintended by the Congress. A national program for the relief of the automobile industry, for example, could conceivably justify preemption of state taxes on automobiles and their many parts. Congress, rather than the courts, should be the forum for the resolution of intersectional political matters.

Preemption arises from an exercise of congressional power. Appellants have failed to demonstrate the nature and extent of the congressional action to which the Montana tax must yield

B. THE "SUBSTANTIAL FRUSTRATION" TEST PROPOSED BY APPELLANTS WOULD BE AN UNWISE DEPARTURE FROM ESTABLISHED PRECEDENT

Preemption under the Supremacy Clause is an all-or-nothing proposition. If preempted, a state law and all state laws like it, must yield to paramount federal power. This Court, in finding preemption under the Supremacy Clause, has invalidated state laws which were conflicting, contrary to repugnant, irreconcilable, and inconsistent with federal laws. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Appellants, however, rely on penumbras of congressional action to establish preemption, an acceptable concept when asserted in defense of individual rights but not acceptable when asserted for the sake of special economic interests. *See*, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

Appellants would introduce a doctrinal shift in Supremacy Clause analysis, altering the established all-or-nothing approach to one which would permit distinctions among similar taxes in a manner reminiscent of Commerce

16. *See*, Wechsler, *The Political Safeguard of Federalism—The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

Clause analysis. The Appellants clearly state that their proposed demonstration of fact at trial would be directed to the impact of the Montana tax at its present magnitude. Brief of Appellants at 45. Appellants' reference to the Wyoming severance tax strongly suggests that the challenge to the magnitude of the Montana tax, if successful, will be the first of many seeking judicial imposition of upper limits. Brief of Appellants at 9, n. 2.

The addition of a balancing of interests concept to Supremacy Clause analysis would compound the difficulties in preemption based on inferred national policies. Any such balancing of interests concept will destabilize the federal system, because it cannot be limited to a judicial compromise of the conflict between producers and consumers of coal. It must proceed to the more difficult question of what is a constitutionally acceptable rate for state severance taxes. This would inevitably require the Court to establish a uniform tax rate, or a uniform absolute rate of taxation per ton which accounts for the higher value of eastern coal per ton, or a consistent rationale for discriminating against western coal. If Appellants are correct, judicial determination of an acceptable rate of tax need not be premised on a clear directive of Congress.

To conclude, the "substantial frustration" test is inconsistent with the position of the states as co-equal partners in the federal system. It would permit the federal judiciary to selectively redefine the relation of federal and state powers in a way which benefits some states at the expense of others. If Congress intended the result that Appellants seek, Congress can express itself in a manner which leaves no doubt about the resolution of the national interests at issue.

III

APPELLANTS HAVE INCORRECTLY INTERPRETED THE POLICIES OF THE MINERAL LANDS LEASING ACT OF 1920, AS AMENDED, AND THEIR SUPREMACY CLAUSE CLAIM IS INVALID

By Count III of their Complaint, the Appellants requested invalidation of the Montana tax in view of the congressional policy and purposes which underlie the Mineral Lands Leasing Act of 1920, as amended. Brief of Appellants at 46 *et seq.* Again, Appellants argue that the Montana tax stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977). Appellants' argument fails due to a specific provision of the 1920 Act (Ch. 85, §32,41 Stat. 450, 30 U.S.C. §189 (1976)) which directly conflicts with their position:

> Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

Appellants contend that the 1920 Act represents a compromise which excludes the concurrent taxation jurisdiction of the states. Their conclusions are based upon faulty analysis of the legislative history.

The Mineral Lands Leasing Act of 1920 was not the culmination of a century of debate but rather a decade of debate precipitated by federal pricing policies for coal lands and President Taft's withdrawal of portions of the public do-

main from oil location in 1909.[17] These changes in federal policies deprived the public domain states of the opportunity to develop additional taxable property, as well as to control development of natural resources within their borders, conditions that had previously guided the public land law of the Union.[18] A compromise was finally reached, not on the 1916 House bill, Brief of Appellants at 46, n. 1, but on a Senate bill introduced in 1919.[19]

The compromise provided for both the division of the federal royalty and continued state taxation.[20] Under Section 35 of the 1920 Act, the federal govenment and the states divided the federal royalty, with the state share being

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17. 58 Cong. Rec. 7773 (1919).

18. *Id.*, at 7772-7774; *See also*, H.R. Rep. No. 17 (Part 2), 64th Cong., 1st Sess. 8 (1916) (Minority views as expressed by Representative Taylor).

19. For a general account of the events leading to the passage of the 1920 Act, see 1 AMERICAN LAW OF MINING 71-86 (1960). The 1920 Act, in stark contrast to the 1916 proposal of the House, received the praise of Representative Taylor. 59 Cong. Rec. 2711 (1920).

20. 58 Cong. Rec. 7646-7649 (1919) (Mr. Mondell); 58 Cong. Rec. 7652 (1919) (Mr. Ferris).

directed to roads and schools.[21] Mineral Lands Leasing Act of 1920, Ch. 85, §35, 41 Stat. 450. Under Section 32, the states retain taxation authority over private lessees and the produce of their labors, including "the output of mines" and other improvements.

The legislative history of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083, demonstrates the continuing vitality of that compromise. When the issue of a fair return to the public for federal coal resources was expressly considered by the House Interior Committee, not one word was said of impediments posed by state severance taxes. H. R. Rept. No. 94-681, 94th Cong., 2d Sess., *reprinted in* [1976]. U.S. Code Cong. & Ad. News 1953. Nor was any intention to preempt state taxes expressed in the context of increasing the state share of federal royalties to meet social and economic impacts. *Id.*, at 1955. Indeed, the Committee's expression of concern for the "onerous" nature of the then existing restrictions strongly suggests that the Congress never believed that it had preempted general state taxation powers. *Id.*

The Federal Coal Leasing Amendments Act of 1975 is not an anomaly in this regard. The Power Plant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. 3289, 42 U.S.C. §§8301 *et seq.* (Supp. III 1979), evidences a similar recognition of state taxation powers in both its text, §601 (a) (2), and its legislative history, S. Rep. No. 95-361, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 8173.

Indeed, the potential for mismatch between federal royalties and impact needs has already received congressional attention. Section 35 of the Mineral Lands Leasing

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21. *See generally* 58 Cong. Rec. 7777 (1919) (Mr. Hersman).

Act was amended by Section 317 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743, 2770, to merely require the states to give priority to those subdivisions impacted by development of minerals leased under the 1920 Act; otherwise the revenues are to be used as the state legislature may direct. 30 U.S.C. §191 (Supp. III 1979).

Count III of Appellants' Complaint was, therefore, properly dismissed.

CONCLUSION

This Brief has focused on the full realm of compelling state interests underlying state coal severance taxes. The fiscal intrests surround the state's present and future duty and ability to deliver those traditional governmental services, facilities and functions which their citizens require. The regulatory interests focus on resource development and enhancement. These compelling state interests[22] require the courts to give great deference to state legislative determinations; particularly when the only challenge is that the tax is not fairly related to the services and benefits provided by the state to the taxpayer. More extensive judicial scrutiny,

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22. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree and the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved and on whether it could be promoted as well with a lesser impact on interstate commerce.

for the benefit of Appellants' narrow economic interests, undermines important state decisions on the method and manner for providing governmental services.

In deferring to legislative determinations, this Court should apply the analysis of *Minnesota* v. *Clover Leaf Creamery Co.*,_____U.S._____, 49 U.S.L.W. 4111 (1981), and hold that the burden imposed by Montana's severance tax is not clearly excessive in light of the substantial present and future state fiscal and regulatory interests. In weighing these interests, it is up to the legislature, not the courts, to decide the wisdom and utility of legislation. Because the question is "at least debatable" regarding the relation of the tax to the state and local interests, "it is not the function of the court to substitute their evaluation of legislative facts for that of the legislature." *Id.*, at 4115.[23]

The judgment of the Supreme Court of the State of Montana should be affirmed.

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23. Although, based on the Court's Equal Protection analysis, the Court reaffirmed the same scrutiny under the Commerce Clause. *See, Minnesota, supra,* at 4116.

Respectfully submitted,

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